IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,
Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR REHEARING

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The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered on March 8, 1971, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

I. OBJECTIONABLE CONTENT OF RESPONDENT'S BRIEF IN OPPOSITION

In its Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida, the Respondent has extracted from the majority opinion of the Florida Supreme Court factual matters stated in that opinion which are so irrelevant to any issue properly before this Court or the Supreme Court of Florida as to be offensive to all fundamental concepts of fairness. (Respondent's Brief, pages 2-3). These factual matters relate to events occurring prior to Petitioner's re-election to office, and prior to the creation of the Commission.[1] The objection to the consideration of these matters was stated in detail in the Petition for Rehearing filed by this Petitioner following the decision of the Supreme Court of Florida. This Petition for Rehearing is set forth verbatim in Appendix "B" to our Petition for Writ of Certiorari herein. These objections were then, and are now, as follows (Appendix "B", pp. 35-40):

APPENDIX "B"

"1. This Court [Supreme Court of Florida] stated in its majority opinion (Slip Opinion, page 5) as follows.

> 'The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge

1. This basic fallacy in the majority opinion was succinctly noted by Chief Justice Ervin in his well-reasoned dissent. See Appendix "A", p. 37.

Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition.'

We respectfully submit that this portion of the Court's opinion may have resulted from the Court's oversight in two respects, each of profound importance.

(a) First, the record of the proceedings before the Commission in this cause reveals clearly that conduct and events occurring prior to the Petitioner's reelection to office were *not* to be considered by the Commission except as they might relate to the Petitioner's present mental competency. Early in the proceedings this was made clear by the Commission (TR. 504-507):

'MR. MASTERSON: May I go to the second point, sir? At the last meeting of the Commission I started to make an argument directed to whether or not the Commission could consider matters which had arisen prior to the formation of the Commission. The creation of the Commission. And the members of the Commission agreed with me, and it was unnecessary for me to argue that point. However, I don't believe anything is in the record at this point which discloses that.

I respectfully request the Commission to make that clear in the record. That the only time that the Commission will go behind an event which occurred prior to the formation of the Commission will be for the purpose of determining the mental competency of the Respondent, Judge Kelly.

CHAIRMAN: I believe you misconstrued or maybe misinterpreted the feeling of the Commission. It seems like the consensus of the Commission at its last meeting that the action was not tied, although dates are identical, that they are tied as

to the formation of the Commission, but were tied to the re-election of Judge Kelly as far as specific acts. That any matters and things pertaining to his mental condition, or which would bear upon his mental condition, occurring prior to his last election would be considered by the Commission, and that any evidence tending to bear upon that question would be received. But as far as specific acts of misconduct in office, assuming that he is sui juris, that those acts that were committed prior to his last election would not be considered by the Commission.

It will be the responsibility of the Commission to weed out this testimony, either on admissibility or upon final consideration of the matter.

If any member of the Commission feels that I haven't stated the consensus of the Commission, I wish they would make their desires known.

JUDGE BARKDULL: I think I am the one that raised the question before. It is my reply in the colloquy we had that it is not my understanding that this Commission sought to discipline Judge Kelly for any misconduct or alleged misconduct that may have occurred prior to his present term of office, but they would make an inquiry as to whether witnesses had an opportunity to observe and see and be familiar with Judge Kelly prior to that time in order to base an opinion as to his competency.

That it was not the purpose of this Commission to discipline Judge Kelly for anything that might have occurred incident, or facts that might have occurred prior to his present term of office.

MR. MASTERSON: I wanted to get that in the record.'

This matter was discussed later in the proceedings when, during Petitioner's examination by his

own counsel, the following exchange occurred (TR. 1357-1358):

'Q. Now, the House Managers conducted a rather thorough investigation, did they not, into your conduct as a trial Judge and as a Circuit Judge in preparation for your trial in the Senate?

A. If they missed anything I don't know what it was. They took an aerial photograph of my house.

Q. Well now, Judge, was there anything in the charges that were filed in the Senate—

CHAIRMAN: I notice that counsel is not objecting, but it would appear to me that this line of inquiry has been vigorously objected to by counsel and has been sustained by the Commission, unless it goes to his mental condition at that time. It doesn't have a thing to do with that subject matter.

MR. MASTERSON: The reason I am offering the testimony is to show that, first of all, there was precedent for filing of this Petition.

CHAIRMAN: Yes, sir.

MR. MASTERSON: And at a time when he was being exhaustively researched for some impropriety that this matter must have come to the attention of people investigating him, and they did not find it improper.

JUDGE RAWLS: He was being investigated for an entirely different offense than which he is being charged here. And the members of this body know it, and we have gone back and forth over that. I am just speaking as one member of the Commission. I don't see any reason for any further inquiry.'

And, of utmost significance in this regard, is the fact that the Commission expressly found that 'there is not sufficient evidence in this record to support a finding that Judge Kelly has a mental or emotional disability that seriously interferes with his conduct as a circuit judge'. (See: 'Report of the Judicial Qualifications Commission, page 7,' R. 110).

Thus, this Court in its majority opinion expressly predicates its approval of the Commission's recommendations upon evidence wholly unrelated to any charge or allegation as to which the Commission found the evidence sufficient or which survived the Commission's scrutiny and findings. In other words, this Court has approved the legality of the Commission's particular findings which were adverse to Petitioner upon the basis of evidence which was concededly unrelated to those charges.

In sum, the factual assertions stated in the above-quoted portion of this Court's opinion are based upon evidence which it was agreed would *not* be used to support any charge of which Petitioner was convicted by the Commission. Clearly, the Commission was correct in refusing to consider specific acts of alleged misconduct in office occurring prior to Petitioner's re-election for any purpose other than mental competence. The Commission correctly acknowledged that it was not its function to second-guess the electorate.[1]

Furthermore, it is of utmost importance that the very limited evidentiary purpose of pre-election conduct be studiously recognized and honored here. As shown in the above-quoted colloquy from the transcript (TR. 1357-1358), Petitioner was not allowed to explore pre-election events to establish the propriety of filing the Petition in the Circuit Court.

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1. "No rule is better settled under our democratic theory than this; when one is re-elected or re-appointed to an office or position he is not subject to removal for offenses previously committed." *Rosenfelder* v. *Huttoe*, 24 So.2d 108, 110 (Fla. 1946).

We respectfully submit that the limitations established below regarding the purpose of this evidence were correct and should be binding here. Therefore, we submit that this Court should not consult or utilize that evidence in any way in reviewing or approving the charges of which Petitioner was convicted by the Commission.

(b) Further, the above-quoted portion of this Court's opinion states that Petitioner 'was rude and inconsiderate of attorneys and Court personnel.' This was the gravamen of the formal charge contained in Paragraph VIII which read as follows:

> 'Failing to be considerate of, and courteous to, counsel and others in attendance upon the court, contrary to Canons Nine and Ten of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.'

Again, the Commission found the evidence as to this charge 'insufficient'. (See: 'Report of the Judicial Qualifications Commission, page 7,' R. 110). Thus, we respectfully submit that this Court overlooked the fact that the Commission, which heard and observed the witnesses, rejected this charge.

In sum, we respectfully submit that this Court has, inadvertently and through oversight, based its approval of the Commission's recommendations upon (1) evidence which is not legally relevant to any issue here and upon (2) an erroneous impression that the Commission had found Petitioner guilty of the 'rudeness' charge."

Thus, the Commission has further compounded a serious error in the factual predicate stated by the Florida Supreme Court in its majority opinion. This error is all the more painful in the light of the Respondent's comment here on page 7 of its brief that the proceedings of the Florida Judicial Qualifications Commission are "remedial in that they allow the people to consider the qualifi-

cations of those serving in high positions and to retain in the Judiciary only those individuals who are qualified to serve in such position." This observation is made in the face of the fact that the Commission relies upon here, and did rely upon in the Florida Supreme Court, events occurring before the "people" re-elected Petitioner to office. The Commission also ignores the fact that the prior impeachment effort ended in an acquittal without a defense being required.

II. NECESSITY OF PRESERVING THE RIGHT TO PUBLICLY PROMOTE JUDICIAL REFORMS

In recent weeks, and even in recent days, the citizens of the United States have had the privilege of reading about in the newspapers, watching on television, and observing in person, certain of the most respected and most influential of American jurists, including the Chief Justice of this Honorable Court and the Attorney General of the United States, espouse principles of judicial reform which go to the very heart of the administration of civil and criminal justice in this country. Indeed, even the President of the United States has, within the last week, urged the National Conference of Judges meeting in Williamsburg, Virginia, to adopt certain practices which would lead to more efficient administration of criminal justice. Particularly in view of this historical setting, which we believe reflects the mood and earnest desires of most Americans, it is incongruous that the dubious public reprimand of Judge Kelly should escape that intense scrutiny of this Court incident to an examination of the merits of Judge Kelly's case. This is of profound importance to the initiation of any meaningful improvement in judicial administration in this country. For, while the rhetoric of St. Louis and Williamsburg is valuable from the standpoint of education and inspiration, its practical effect necessarily depends on determined action by

judges who care at the grass roots level. And we must fervently ask: "Where will these judges be if they are subject to reprimand for 'rocking the boat'."

In the Petition filed by Judge Kelly with the Clerk of the Circuit Court, Judge Kelly made ten recommendations. Five of his recommendations related directly to speedy trials for accused prisoners and more efficient administration of the courts in his judicial circuit. (Appendix "A" to Petition for Writ of Certiorari, pages A-10 and A-11). Judge Kelly was reprimanded for publicly making these suggestions!

Let us consider for a moment the posture of any other circuit judge in the State of Florida. No matter how sincere his motives, no matter how meritorious his ideas, and no matter how significant his recommendations, will he nevertheless have substantial fears of public reprimand or even loss of position if he chooses to advise the public of his thoughts relating to the administration of justice? Regardless of the decision by this Court on the merits of this case, at least this Court should assure other judges in the State of Florida and throughout the country that the First Amendment protects judges as well as others who publicly suggest judicial reform.

Further, and with particular reference to the facts of the instant case, we submit that there is a disturbing attitude running through the Respondent's Brief in this cause.

Respondent refers to the right of the Judiciary to protect itself against "outsiders". (Respondent's Brief, p. 5). We must ask rhetorically: who, in a free society, can be considered to be an "outsider". The thrust of the Respondent's attitude toward this case is that Judge Kelly, by disclosing to the public his view of the defects in criminal administration and his suggested reforms, has breached

a set of mystic temple rules. The impression one gains from the Commission's comments here is that the courts of this Nation constitute one enormous Star Chamber with certain "secrets" related to basic questions of criminal administration which "secrets" cannot withstand the harsh glare of public scrutiny.

In essence, we again respectfully invite this Court's attention to the tone and content of the public utterances of Petitioner which form the basis of his being reprimanded. If the reprimand of a Judge for these reasons were constitutionally acceptable then the opportunity for effective judicial reform in the State of Florida would be virtually eliminated. This reform depends, in large measure, upon the right of the people to be advised of the shortcomings of the present system by the people who know—the Judges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Rehearing have been furnished by United States Mail to Marion E. Sibley, Esquire, of Sibley, Giblin, Levenson & Ward, 605 Lincoln Road Mall, Miami Beach, Florida 33139, Counsel for Respondent; and to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32302, on this 26th day of March, 1971.

.....

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